



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

September 25, 2003

Ref: 8ENF-W

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Tim Tollefsrud, Director
Division of Environmental Services
South Dakota Department of Environment and Natural Resources
Joe Foss Building
523 East Capitol Ave.
Pierre, SD 57501

Re: Notice of Proposed Assessment of
Class II Civil Penalty
Docket No. **CWA-08-2003-0098**

Dear Mr. Tollefsrud:

Enclosed is a copy of an administrative complaint and notice of proposed assessment of a civil penalty against Mark and Dan Johnson ("Respondents") of Madison, SD. The United States Environmental Protection Agency ("EPA") filed the complaint pursuant to section 309(g), 33 U.S.C. section 1319(g), of the Clean Water Act ("CWA") to begin the process to assess administratively a Class II civil penalty of \$55,000 jointly and severally against the Respondents for violations of the CWA. Because the violations occurred in South Dakota, EPA is offering you the opportunity to confer with us regarding the proposed assessment.

You or your staff may request a conference within 30 days of receiving this letter. The conference may be in person or by telephone and may cover any matters relevant to the proposed assessment.

A copy of EPA procedures governing the administrative assessment of civil penalties under the CWA is enclosed for your reference. If you have any questions, the most knowledgeable person on my staff for legal issues is Peggy Livingston, Enforcement Attorney,



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who can be reached at 303-312-6858. The most knowledgeable person on my staff for technical issues is Ms. Heimdal, who can be reached at 303-312-6359.

Sincerely,

Signed

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:

1. Administrative Complaint
2. Administrative Penalty Procedures (40 C.F.R. Part 22)
3. Certificate of Service

cc: Tina Artemis, EPA, Regional Hearing Clerk

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

In the Matter of:)	ADMINISTRATIVE COMPLAINT
)	
Mark and Dan Johnson)	
Lake County, SD)	Docket No. CWA-08-2003-0098
)	
Respondents.)	

I. STATUTORY AUTHORITY

1. This Administrative Complaint (“Complaint”) is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by section 309(g)(1)(A) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(1)(A), and properly delegated to the undersigned EPA official (“Complainant”).
2. Pursuant to section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits,” 40 C.F.R Part 22, Complainant hereby proposes the assessment of a civil penalty against Mark and Dan Johnson (“Respondents”) for their violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

II. ALLEGATIONS

1. Respondents own, control, and operate property that includes the northwest quarter of section 2, Township 106 North, Range 53 West, in Lake County, South Dakota.
2. Respondents are each a “person” as defined by section 502(5) of the CWA, 33 U.S.C.

§ 1362(5).

3. At all times relevant to this Complaint, Respondents own and operate farmland and other property, including the northwest quarter of section 2, Township 106 North, Range 53 West, in Lake County, South Dakota, and are responsible for conducting, managing, overseeing, and directing farming and other related activities at this site. The site contains water bodies, including a large unnamed wetland basin (hereafter “wetland A”), a smaller unnamed wetland basin (hereafter “wetland B”), and an unnamed tributary to Lake Herman.
4. Some time between April 12, 2000, and May 17, 2000, Respondents dredged a new ditch in an approximately twenty-acre wetland basin (wetland B) that had no prior drainage history.
5. On December 30, 2001, Respondents dredged an agricultural drainage trench in an existing linear waterway that is a tributary of Lake Herman with the intent to drain a large (greater than 100 acres) wetland basin (wetland A). This activity joined the dredged ditch referenced in paragraph 4 above with wetland A, which is located up-gradient of wetland B, creating a continuous drainage ditch connection from wetland A to the southwest quarter of section 2, Township 106 North, Range 53 West, at Respondents’ property boundary.
6. The work referenced in paragraphs 4 and 5 above was performed using common earthmoving vehicles and equipment including, but not limited to, a backhoe operated by or on behalf of Respondents.
7. The activities described in paragraphs 4 - 6 above resulted in the discharge of pollutants, including dredged material, from a point source or point sources on Respondents’

property, at or about the northwest quarter of section 2, Township 106 North, Range 53 West, in Lake County, into waters of the United States, including wetland A, wetland B, and the linear waterway and its contiguous wetlands, without a permit, in violation of CWA section 301(a), 33 U.S.C. § 1311.

8. The dredged material referenced in paragraph 7 above was discharged to greater than 2600 linear feet of waters of the United States, including wetland A, wetland B, and the linear waterway and its contiguous wetlands.
9. The activities described in paragraphs 4 - 6 above were intended to drain greater than 120 acres of wetlands and convert them to farm land.
10. The activities described in paragraphs 4 - 6 above were not exempt from permitting pursuant to section 404(f)(1)(C) of the CWA, 33 U.S.C. § 1344(f)(1)(C), which addresses maintenance of drainage ditches.
11. Water flowing from wetland A through the linear waterway and wetland B discharges into Lake Herman approximately 1.25 miles downstream. Lake Herman flows into Silver Creek, which flows into Park Creek, which flows into Lake Madison, which flows into Brant Lake, which flows into Skunk Creek, which flows into the Big Sioux River. The Big Sioux River flows into the Missouri River, both of which are navigable, interstate waters within the meaning of section 502 of the CWA, 33 U.S.C. § 1362. Wetland A, wetland B, and the linear waterway and its contiguous wetlands are tributary to the Big Sioux River and the Missouri River.
12. On January 3, 2002, the Army Corps of Engineers (“Corps”) inspected the site and discovered the unauthorized discharges of dredged material to waters of the United States.

13. On January 22, 2002, the Corps issued a cease and desist order to Respondents.
14. According to Respondents' December 13, 2002, first annual monitoring report, between November and December, 2002, the unauthorized dredged material was removed from the impacted wetlands and linear waterway by Respondents pursuant to EPA's administrative order for compliance, Docket No. CWA-08-2002-20, issued to Respondents on May 6, 2002.
15. Pursuant to EPA's May 6, 2002, administrative order for compliance, restoration activities, including revegetation, best management practices, monitoring, and reporting, will continue until EPA determines that the site has been restored to its pre-impact conditions.
16. The earthmoving vehicles and equipment referenced in paragraph 6 and used in Respondent's activities discussed above are each a "point source" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).
17. The discharged dredged materials discussed above are "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 230.2.
18. Wetland A, wetland B, and the linear waterway and its contiguous wetlands are "waters of the United States" as defined in 33 C.F.R. § 328.3(a) and therefore "navigable waters" as defined in section 502(7) of the CWA, 33 U.S.C. § 1362(7).
19. The placement of the discharged material into wetland A, wetland B, and the linear waterway and its contiguous wetlands constitutes the "discharge of pollutants" as defined in section 502(12) of the CWA, 33 U.S.C. § 1362(12).
20. The wetlands and linear waterway impacted by the activities described in paragraphs 4 - 6 above provided various functions and values including serving as habitat for local and

migratory birds and other wildlife, water quality enhancement, water storage and retention, and flood control.

21. Respondents are subject to the provisions of the CWA, 33 U.S.C. § 1251 et seq., including sections 301(a), 308, 309(g), and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1318, 1319(g), and 1344, respectively.
22. Respondents' discharges were carried out without the required authorization from the Corps pursuant to section 404 of the CWA, 33 U.S.C. § 1344.
23. On January 23, 2002, EPA Region 8 was notified by the Corps of the violations described above.
24. Each discharge of pollutants from a point source by the Respondents between April 12, 2000, and May 17, 2000, into "navigable waters" without first obtaining the requisite authorization pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
25. Each discharge of pollutants from a point source by the Respondents on December 30, 2001, into "navigable waters" without first obtaining the requisite authorization pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
26. Each day the discharges remained in wetland A, wetland B, and the linear waterway and its contiguous wetlands without the required permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes an additional day of violation of section 301 of the CWA, 33 U.S.C. § 1311.
27. Pursuant to section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA will consult with Tim Tollefsrud, Director, South Dakota Department of Environment and Natural Resources,

regarding assessment of this administrative penalty by furnishing a copy of this Complaint and inviting him to comment on behalf of the State of South Dakota.

III. PROPOSED ADMINISTRATIVE PENALTY

Based upon the foregoing allegations, and pursuant to its authority under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA Region 8 hereby proposes to assess an administrative penalty of \$55,000 against Respondents.

The proposed penalty amount was determined by EPA after taking into account all factors identified at section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), as more fully discussed in Exhibit 1. These factors include the nature, circumstances, extent, and gravity of the violations, Respondents' prior compliance history, Respondents' degree of culpability for the cited violations, any economic benefit or savings accruing to Respondents by virtue of the violations, Respondents' ability to pay the proposed penalty, and other matters that justice may require.

IV. TERMS OF PAYMENT

If Respondents do not contest the findings and assessments set out above, payment of the penalty for the violation may be forwarded to EPA. If such payment is made within 30 calendar days of receipt of this Complaint, then no answer need be filed. Penalty payment must be made by certified or cashier's check payable to "Treasurer, the United States of America," and remitted to:

Regional Hearing Clerk
P.O. Box 360859 M
Pittsburgh, PA 15251

A copy of the check shall be sent to:

Peggy Livingston
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, CO 80202-2466

A transmittal letter identifying the case title and docket number must accompany the remittance and copy of the check. The case title and docket number should also be indicated directly on the check.

Neither the assessment nor the payment of an administrative penalty pursuant to section 309(g) of the CWA shall affect Respondents' continuing obligation to comply with the CWA or any other Federal, state, or local law or regulation or any compliance order issued under the CWA.

V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

As provided in section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 22.15(c), Respondents have the right to a hearing in this matter. If Respondents (1) contest any material fact upon which the Complaint is based, (2) contend that the amount of penalty proposed in the Complaint is inappropriate, or (3) contend that they are entitled to judgment as a matter of law, Respondents must file a written answer in accordance with 40 C.F.R. § 22.15 within thirty (30) days after service of the Complaint.

Respondents' answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint, (2) state the circumstances or arguments that are alleged to constitute grounds for defense, (3) state the facts intended to be placed at issue, and (4) specifically request a hearing, if desired. 40 C.F.R. § 22.15(b). Failure to admit, deny, or explain any materially factual allegation contained in the Complaint constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). Respondents' answer, an original and one copy, must be filed with:

Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

A copy of Respondents' answer and all other documents filed in this action must be sent to:

Peggy Livingston
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, CO 80202-2466

If Respondents request a hearing on the proposed penalty assessment, members of the public who have exercised their right to comment on this Complaint will have the right to present

evidence on the propriety of the penalty assessment. EPA is obligated to give notice of the hearing to those who comment. Section 309(g)(4)(B) of the CWA and 40 C.F.R. § 22.45.

**IF RESPONDENTS FAIL TO REQUEST A HEARING,
THEY WILL WAIVE THEIR RIGHT TO CONTEST ANY
OF THE ALLEGATIONS SET FORTH IN THE
COMPLAINT.**

**IF RESPONDENTS FAIL TO FILE A WRITTEN ANSWER
WITHIN THE THIRTY (30) DAY TIME LIMIT, A
DEFAULT JUDGMENT ENTERED PURSUANT TO
40 C.F.R. § 22.17 MAY IMPOSE THE FULL PENALTY
PROPOSED IN THE COMPLAINT.**

Members of the public who comment on this Complaint during the thirty (30) day period will have an additional thirty (30) days to petition EPA to set aside any consent agreement that may be reached and to hold a public hearing thereon. A petition will be granted and a public hearing held to comment on the consent agreement only if the petitioner's evidence is material and was not considered by EPA in the issuance of the consent agreement. 40 C.F.R. § 22.45(c)(4).

VI. SETTLEMENT CONFERENCE

EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation process. If a settlement can be reached, its terms must be expressed in a written consent agreement signed by the parties and incorporated into a final order by the Regional

Judicial Officer. 40 C.F.R. §22.18.

Please direct a request for a settlement conference, or any questions regarding this

Complaint, to:

Peggy Livingston
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, CO 80202-2466
303-312-6858

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8
Complainant.

Date: 9/25/03

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I sent by certified mail, return receipt requested, a copy of the foregoing Administrative Complaint and a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22, to the following persons at the addresses listed below:

Mark Johnson
507 N. Catherine Ave.
Madison, SD 57042

Certified Return Receipt No. 7003 1010 0002 6364 3754

Dan Johnson
915 N. Harth Ave.
Madison, SD 57042

Certified Return Receipt No. 7003 1010 0002 6364 3747

I further certify that, on the date noted below, I sent by certified mail, return receipt requested, a copy of this document to the following person at the address listed below:

Tim Tollefsrud, Director
South Dakota Department of Environment and Natural Resources
Joe Foss Building
523 East Capitol Ave.
Pierre, SD 57501

Certified Return Receipt No. 7003 1010 0002 6364 3730

The original and one copy was filed by hand with:

Tina Artemis
Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

Date: 9/25/03

Judith M. McTernan

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 25, 2003.